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Supreme Court of the United States

October Term 1973

No. 73-1062

EDMUND ROSNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Introduction

This supplemental brief in support of the petition for certiorari is being filed as the result of this Court's recent decision—rendered after the original petition was filed—in *Joshaway Davis* v. *Alaska*, 14 Cr.L.Rep. 3113 (February 27, 1974) which governs an important issue in this case (see petition for certiorari at pp. 34-36). Normally, petitioner would have waited to make this argument in a reply brief. But the government is now several weeks late in filing its response to the petition, and there is no assurance that any response will be filed, or that there will be sufficient time for the petitioner to file a reply brief if a government response is belatedly filed. Accordingly, we have decided to employ the format of a supplemental brief to argue that

this Court's decision in the *Davis* case requires either A) a remand for a new trial; or B) a remand to the Court of Appeals for reconsideration in light of *Davis*.

Argument

Petitioner respectfully requests this Court to remand the instant case in light of *Davis* v. *Alaska*, which is indistinguishable from, and dispositive of, the instant case. In this case, the defendant's lawyer served subpoena's upon the Police Department's Internal Affairs Division and the Bronx District Attorney's office in order to obtain information concerning Robert Leuci, the Government's main witness against Rosner (Trial Transcript at p. 13).[1] Attorneys for the New York City Police and the Bronx District Attorney opposed disclosure of some of the material on the ground that it would be in violation of state law requiring confidentiality (*Id.* at 34).[2] The trial court, stating that he was "unaware of any precedent that permits anybody to rummage around in raw files" (*Id.* at 23), ruled that the files were not producible to the defendant's lawyers (*Id.* at 41, 203), but agreed to inspect them himself *in camera* (*Id.* at 204). After inspecting them, he ruled that he would not order the government to "turn over any part of those files to you. . . ." (*Id.* at 338), since they contained "no indica-

[1] Some of the records in issue had been turned over previously to the U.S. Attorney's office and others had been retained by the local authorities. Rosner's lawyer sought their production (*Id.* at 14), under "constitutional subpoena power and also pursuant to Rule 17 . . ." (*Id.* at 21). Rosner's attorney agreed to be bound by an order "that this material may not be disclosed outside of the processes of this Court" (*Id.* at 25).

[2] Rosner's attorney alleged that he had received information that Leuci had been involved in extensive narcotics violations and shakedowns and that a tape recording detailing Leuci's criminal record, which had been in the possession of the U.S. government, had been deliberately destroyed (*Id.* at 20).

tion of discipline". Premising his decision on the assertion that the requested files were confidential under New York law (*Id.* at 338), he held that the authorities did not require the disclosure of anything short of actual discipline (*Id.* at 339).

At the trial on direct examination by the government, Leuci admitted to being involved in four instances of corrupt activities from late 1966 through the middle of 1967 (A 24-25, 214), but he vigorously denied on cross-examination any other illegal activities (A 225, 241, 245).[3] After the conclusion of the trial, defendant moved for a new trial on the ground of newly discovered evidence relating to Leuci's criminality. At the hearing on that motion, Rosner's lawyer again sought permission to see the IAD files (Transcript of January 26, 1973, at page 20). Though the trial judge acknowledged that there "were a number of things [in the file] that [Rosner's lawyer] might have found interesting" (*Id.* at 29), he again denied the request. But he did order the "IAD file [to be] preserved" so that "if the Court of Appeals wants to see it, it can". (*Id.* at 32).

The Court of Appeals affirmed the conviction without passing on this issue, despite the fact that subsequent to the District Court's decision quashing the subpoenas, the New York Supreme Court held in *People* v. *Sumpter*, 75 Misc.2d 55, 347 N.Y.S.2d 670 (Sp.Ct. N.Y. Co. 1973), that personnel records of police officers who are expected to be

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[3] It is of course clear that where a government witness has, on direct examination by the government, affirmatively denied committing crimes (or as in this case, where he has denied committing more than four specified crimes) the defendant may establish that he did commit such crimes and that his denial was a lie. *Walder* v. *United States*, 347 U.S. 62, 65 (1954); *United States* v. *Keilly*, 445 F.2d 1285 (2d Cir. 1971); *United States* v. *Cuadrado*, 413 F.2d 633, 635 (2d Cir. 1969); *United States* v. *Beno*, 324 F.2d 582, 588 (2d Cir. 1963); see also *Giglio* v. *United States*, 405 U.S. 150 (1972); *People* v. *Robertson*, 12 N.Y. 2d 355 (1963).

prosecution witnesses *are not confidential* under New York law and are producible if they could be of any use to the defendant in preparing his cross-examination or could serve any other legitimate defense purpose.

This Court's decision in *Davis* v. *Alaska* plainly controls the instant case. In *Davis*, the trial court—acting pursuant to an explicit state statute—granted a protective order to prevent any reference to the juvenile records of the government's key witness. Despite the obvious and accepted state interest "to preserve the anonymity of a juvenile offender", this Court held that the protective order denied defendant his constitutional right to cross-examination.

> . . . [T]he right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case —is outweighed by petitioner's right to probe into the influence of possible bias on the testimony of a crucial identification witness.
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> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records. 14 Cr.L.Rep. at 3121.

The *Davis* case is indistinguishable from the one at bar. Here, too, the state asserted—and the trial court relied

on—an alleged interest in privacy. Moreover, the interest at issue in this case—the confidentiality of police disciplinary records—is far less compelling than the interest at issue in *Davis*. The only argument for confidentiality alluded to by the trial judge here was that the records requested contained "no indication of discipline". The weakness of this proposition—that disciplinary files are producible only if discipline has actually been imposed—is patent. It is universally recognized that the police department is often reluctant to impose disciplinary sanctions on its own even in cases where discipline is plainly warranted. See, e.g. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Surely, it is possible—and that is all a defendant need show in the context of a constitutional exercise of the subpoena power—that the records could contain evidence of wrongdoing that, for one reason or another, did not result in discipline; but which could be put to proper and important use by a defense lawyer. The embarrassment to a professional adult policeman of the limited revelation[4] of his disciplinary file is an interest far less deserving of judicial protection than the embarrassment to a juvenile. In any event, the state of New York has not seen the policeman's embarrassment as an interest warranting either legislative or judicial protection (*People* v. *Sumpter, supra*); whereas the state of Alaska did have a statute explicitly prohibiting the revelation of juvenile records. Despite this statute, the Court held that if the government wanted to protect the juvenile witness from embarrassment, it should have refrained "from using him to make out its case". In this case —as in *Davis*—the government "can not, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interests in the secrecy of juvenile criminal records", especially where, as

[4] See note 1, *supra*.

here, the interest in the secrecy of police disciplinary files, has not even been recognized by the State.

In the instant case, as in *Davis*, the critical issue was the witnesses' motive in testifying against the defendant. The instant petitioner's counsel sought to show that Detective Leuci had been motivated to make the case against petitioner (and others) because of his own illegal dealings in narcotics and his fear of prosecution and/or discipline. By denying petitioner's counsel access to the subpoenaed files, the government and the Court prevented him from developing the issue of bias before the jury. What this Court said in *Davis* is precisely on point in the instant case:

> . . . While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lack that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which " 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart* v. *Janis*, 384 U.S. 1, 3" Smith v. Illinois, 390 U.S. 129, 131 (1968).

Although defense counsel was, in this case, permitted *to attempt* to cross-examine Detective Leuci on the issue of his motive, he was denied the adversary tools necessary "to make any such inquiry effective". Without access by counsel to the information contained in the subpoenaed files, "the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness. . . ." Moreover, in the instant case—unlike in *Davis*—the government's witness explicitly denied having committed the crimes at issue. Access to the subpoenaed files would have permitted defense counsel to attempt to establish that Detective Leuci had perjured himself by his denials.[5]

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[5] See note 3, supra. In limiting disclosure to instances of actual discipline, the trial judge was obviously confusing the standard for *questions that might be asked on cross-examination*, with the standard *for information that might be useful to a defense lawyer in providing leads for further investigation that might produce information that would be used on cross-examination.* Assuming arguendo that the Judge was correct in his conclusion that bare allegations of wrong-doing that did not lead to discipline may not —by themselves—form the basis for cross-examination questions, certainly that is not the relevant issue. The issue is whether the subpoenaed material might form "a basis for further investigation". See cases cited in A.B.A., Discovery and Procedure Before Trial at p. 77. It is clear that such material is producible. As the Supreme Court said in *Giles* v. *Maryland*, 386 U.S. 66, 74 (1967): "There can be little doubt that the defense might have made effective use of the report at trial *or in obtaining further evidence*". (Emphasis added.) See also *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968). There can be no doubt that a complaint file—*which admittedly did contain specific accusations of wrongdoing against Detective Leuci*—(see transcript of January 26, 1973 at p. 9)—would have provided leads for further investigation. Nor did trial counsel fail to raise this point at trial. He plainly pointed out the distinction between information that could be used directly as the basis for a question on cross-examination, and information that would provide leads for further investigation. He specifically requested "information contained in that file which coupled with some information I have takes a complaint letter from something which seems to be unfounded into something which may well be factual" (*id.* at 26).

Since the *Davis* case, decided after the Court of Appeals decision in this case, is now the leading controlling precedent on this issue, petitioner respectfully requests this honorable Court either A) to reverse the conviction and remand for a new trial; or B) to remand the case to the Court of Appeals for reconsideration in light of *Davis*.

Respectfully submitted,

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